

(2001) 09 PAT CK 0040

In the Patna High Court

Case No : C.W.J.C. Nos. 6224/94, 5797/99, 5876 and 6604 of 2000 and 515, 571, 929 and 5293 of 2001

Rameshwar Pati Tripathi and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 25-09-2001

Acts Referred:

Citation : (2001) 09 PAT CK 0040

Final Decision : Dismissed

Judgement

S.N. Jha, J.—The dispute in this batch of writ petitions which have been heard together relates to recruitment to the Bihar Judicial Service on the basis of 24th Judicial Service Examination.

2. The dispute has a chequered history. The advertisement for the 24th Judicial Service Examination was published by the Bihar Public Service Commission (in short "the Commission") initially for only 7 posts in 1990 itself, though in the advertisement it was mentioned that the number could increase. On 7.10.91 another advertisement was published with respect to 245 vacancies. The category-wise break-up of vacancies was mentioned as: General - 123, Scheduled Castes (SC) - 34, Scheduled Tribes (ST) - 25, Most Backward Classes (MBC) - 29, Backward Classes (BC) - 20, Economically Backward Classes (EBC) - 7 and Women - 7. At this stage itself it may be mentioned that though the total number of vacancies for the MBC, BC, EBC and Women works out to 63, 64 vacancies have been treated as reserved for OBCs comprising the said categories.

3. Meanwhile the written examination was held between 25.4.91 and 30.4.91. On 18.4.94 the result was published. 539 candidates of different categories including 277 General candidates qualified for the viva voce test on the basis of cut-off marks. It is relevant to mention here that the High Court on its administrative side had by letter dated 18.3.94 advised the Commission to fix the cut-off marks at 45% for non-SC/ST candidates and 35% for SC/ST candidates. The letter also mentioned that the candidates not more than three

times the number of vacancies be called for interview and to that extent the qualifying marks may be pushed up. The said advice was given in accordance with Rule 15 of the Bihar Civil Services (Judicial Branch) (Recruitment) Rules, 1955, Clause (A) whereof lays down that the Commission i.e. Bihar Public Service Commission shall have discretion to fix the qualifying marks at the written examination in consultation with the Patna High Court. Accordingly those 539 candidates were called for viva voce test which was held from 2.5.94 to 9.5.95. On 16.5.94 list of 195 successful candidates was published. This included 123 candidates in the General category and 72 in the reserve categories including the DBCs.

4. Meanwhile writ petition bearing CWJC No. 7619 of 1991 on behalf of Dipak Kumar Singh and others had been filed in this Court challenging the advertisement dated 7.10.91 in so far as it provided for reservation for the OBCs on the ground that reservation of posts in the Bihar Judicial Service for the OBCs was illegal. The writ petition was allowed on 6.8.93 vide judgment reported in 1993 (2) PLJR 385 holding that the reservation for OBCs was not permissible. Against the said judgment the State of Bihar preferred SLP (Civil) No. 16476 of 1993. On 13.5.94 the Supreme Court passed the following order, "List this matter before the Constitution Bench immediately after summer vacation. In the meanwhile, the process of selection may be proceeded with but actual order of appointment shall not be issued". It may be pointed out that by the time the said order was passed the viva voce test was over. In fact, the final result of 195 successful candidates was published three days after on 16.5.94. On 16.11.95 the order dated 13.5.04 was modified thus:

If the selection process is over, the selects may be appointed subject to result of this petition and further subject to the seniority that may be required to be adjusted if reservation is upheld and candidates to fill in the reserved slots are selected at any time hereafter and become entitled to appointment. However, question of filling up the reserved posts will not arise and they shall remain in abeyance but if after this Court decides the issue of reservation in the instant case and selections are made even thereafter and appointments are made they will be entitled to their respective seniorities at the slots available as on the date of appointment of General category candidates.

Pursuant to the above order of the Supreme Court appointments in the General and SC/ST categories were made, appointments in the OBC category remained in abeyance. SLP No. 16476/93 (giving rise to Civil Appeal No. 2083/2000) was finally decided on 14.3.2001 along with Civil Appeal No. 9072 of 1996 arising out of another judgment of this Court relating to the post of Additional District Judge in the Bihar Superior Judicial Service. The judgment, titled State of Bihar and Another Vs. Bal Mukund Sah and Others, The Constitution Bench by majority held that Section 4 of the Bihar Reservation of Vacancies in Posts and Services (For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1991 (in short "the Reservation Act") is not applicable to recruitment of Judicial

Officers in the State of Bihar as there was no provision for reservation for the OBCs. in the Bihar Judicial Service (Recruitment) Rules 1955 (or the Bihar Superior Judicial Service Rules, 1951). Such reservation is therefore impermissible. To this extent the original writ petition i.e. CWJC No. 7619/91 (supra) was partly allowed holding.

Section 4 of the impugned Act does not apply to those recruitments and the scheme of reservation of 14% for SCs and 10% for STs only will apply to such recruitment. As a result, the question of filling up of reserved posts in this case will remain germane to the aforesaid extent of permissible reservation of 24% for SC and ST candidates. The authorities concerned will work out the rights of the selected candidates for being appointed to these posts governed by the Bihar Judicial Service (Recruitment) Rules, 1955 accordingly, keeping in view the direction contained in the interim order of this Court dated 16.11.95.

5. Making grievance that no follow-up action was being taken by the government or the Commission to fill up 64 vacancies which stood released pursuant to the judgment of the Supreme Court, a writ petition, CWJC No. 11335 of 2000 was filed by Rajendra Chaubey and others, for suitable directions to them. On 10.6.2000 the Commission requested the State Government to return the recommendation in the light of the judgment of the Supreme Court. On 18.8.2000 the Personnel Department vide its letter no. 6749 returned the recommendation in the OBC category except those of Ranjit Kumar and Ashok Kumar Gupta in respect of whom notification of appointment had already been issued (pursuant to Court orders) with a request to send fresh recommendation against 64 vacancies. Also, the Department communicated the decision of the Government to carry forward the 23 unfilled vacancies of the SC and ST categories purportedly in terms of Sub-section (6)(A) of Section 4 of the Reservation Act. It may not be out of place to mention at this very stage that the decision to carry forward the unfilled vacancies of the SC/ST categories was challenged in CWJC No. 8655/2000 on the ground that "carry forward" of unfilled vacancies was contrary to Rule 20 of the Judicial Service (Recruitment) Rules. On 24.1.2001 by judgment, titled Narayan Das Sharma and Others, etc. Vs. State of Bihar and Others this Court upheld the contention of the Petitioner and directed the Commission to send supplementary list of successful and suitable candidates from the merit list in terms of Rule 20 of the Recruitment Rules for appointment against the unfilled vacancies.

6. Pursuant to the directions of the Supreme Court and communication of the State Government dated 18.8.2000 list of 64 successful candidates was published in the newspapers on 1.1.2001. Recommendation was formally sent to the Government on 28.4.2001. Similarly, pursuant to the direction of this Court in Narain Das Sharma's case (supra) a supplementary list of 23 successful candidates with respect to the vacancies of the SC/ST quota was published on 11.6.2001. CWJC. Nos. 515, 571, 929, 5293 and 6604 of 2001 have been filed for quashing the result of 64 candidates contending that after the vacancies

stood released pursuant to the judgment of the Supreme Court, the Commissioner should have held fresh viva voce test calling candidates three-times the number of vacancies on the basis of marks at the written examination. This is the main issue involved in these cases. The other issue relates to the number of vacancies. The case of the concerned Petitioners in CWJC No. 5797/99 and 5876/2000 is that as per the affidavit of the State in SLP (Civil) No. 16476/93 and letter of the Registrar, Patna High Court, vacancies were available and recruitment should be made against all of them. Direction is accordingly sought to recommend candidates against those vacancies. I propose to consider first the issue relating to the recommendation of the aforesaid 64 candidates. As indicated above, that is the main issue involved in these cases.

7. The case of the Petitioners aggrieved by the recommendation of the 64 candidates is that by letter dated 18.3.94 the Registrar, Patna High Court had informed the Commission to call for interview candidates thrice the number of vacancies securing 45% qualifying marks in the General category, and, therefore, the Commission was obliged to call 192 candidates against the released 64 vacancies @ three times the vacancies on the basis of the marks secured by the candidates in the General category at the written examination. Without holding any viva voce test and, thus, without giving any opportunity to the candidates at large the Commission recommended 64 candidates from the same merit list which had been prepared earlier. In this manner the candidates who had secured lesser marks than others at the written examination were recommended on the basis of the total marks of the written examination and the viva voce test. Had the Commission held fresh viva voce test giving opportunity to 192 candidates, in order of merit, this anomaly would not have occurred. Further, the recommendation could have been in conformity with Rule 19 of the Recruitment Rules.

8. It may be mentioned here that though the recommendation with respect to all 64 candidates was generally challenged, counsel for the Petitioners finally confined their grievance to 6 of them, 3 each in the lists dated 1.1.2001 and 11.6.2001. But no argument was made with reference to the list/recommendation dated 11.6.2001. The names of the three candidates of the said list were not even disclosed in course of hearing. Pointed argument was made with respect to Sanjay Kumar, Shasidhar Vishwakarma and Md. Hasibullah Ansari at serial Nos. 18, 22 and 56 of the list dated 1.1.2001. It was stated that they had secured respectively 461, 458 and 452 marks at the written examination which was less than the marks of the last candidate called for viva voce in the General category i.e. 473. Apparently they had been called for viva voce in the OBC category by virtue of reservation and finally selected on the basis of aggregate marks of the written examination and viva voce test in terms of Rule 19. No. reservation for OBCs, however, being permissible they could not be selected on the basis of the aggregate marks because if they were not eligible for being called for viva voce test, they could not be finally selected.

9. The argument of the counsel is quite attractive but for the reasons mentioned hereinafter, I am not inclined to interfere with the recommendation of the concerned candidates. It is true that as the things stand now, after the judgment of the Supreme Court in Balmukund Sah's case, the OBCs can come in only by virtue of merit. As per the policy decision of the State Government, and also the Reservation Act, candidate of any reserve category competing for selection by virtue of merit, and not reservation, is treated on par with the General category and as such appointed against a general post. Thus, Sanjay Kumar or Shasidhar Vishwakarma or Md. Hasibullah Ansari securing less marks than the last candidate called for viva voce test in General category, could not have been called for interview, but for reservation as the position stood at the relevant time. However, it is to be kept in mind that the Supreme Court by its first interim order dated 13.5.94 had allowed the selection process to be completed, the prohibition was only on appointment. This is one aspect of the case.

10. In course of hearing it was stated by the counsel for the Respondents, that except three, amongst the Petitioners, namely, Rameshwar Pati Tripathy in CWJC No. 571/2001. Pravin Kumar Singh Srinet in CWJC No. 6604/2000 and Amit Kumar Sinha in CWJC No. 515/2001, who had secured 471, 471 and 470 marks respectively against the cut-off marks of 473, no other Petitioner in this batch of cases secured more marks than the said Sanjay Kumar, Shasidhar Vishwakarma or Md. Hasibullah Ansari. It was accordingly submitted by their counsel that at least such of the Petitioners who secured less marks than them have no right to question, their recommendation and no writ can be issued at their instance. Reliance was placed on Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College, . It was submitted that the grievance of the Petitioners apart, there might be candidates securing more marks than Rameshwar Pati Tripathy or Pravin Kumar Singh Srinet or Amit Kumar Sinha, and more qualified for viva voce test, had the 64 posts in question been treated as un-reserved.

11. The question which precisely arises for consideration is what the Commission ought to have done after the vacancies stood released pursuant to the decision of the Supreme Court or what ought now to be done after the recommendations have been made against 64 vacancies (plus 23 vacancies). The contention of the Petitioners, as indicated above, is that 192 candidates on the basis of marks of the written examination @ three-times the number of vacancies i.e. 64, should have been called for viva voce test. The fact, however, is that out of 377 candidates of the General category called for viva voce test, against 123 vacancies, 244 were not recommended. It may be mentioned that for 123 vacancies only 369 candidates i.e. three-times, should have been called but as 9 candidates were bracketted at 473 marks, 8 more candidates were also called. Out of those 377 candidates 123 were appointed at the first instance. Later, as a result of non-joining, it was stated, 10 more were appointed leaving thus 244 candidates in the list of 377 candidates who were not recommended. The number of candidates already called for interview in the general category, but not finally recommended, being thus more than 192 who should have been called for

fresh viva voce, according to the Petitioners, the recommendation must be held to be in accordance with the advice of the High Court. It is, no doubt, true that had there been open consideration without treating 64 vacancies as reserved Sanjay Kumar and others would not have been called for viva voce because they had got lesser marks. They got the chance by virtue of reservation. But having been finally recommended on the basis of the written marks together with the viva voce marks the recommendation must, also broadly, be said to be in conformity with Rule 19 of the Recruitment Rules. The said Rule runs as under:

The marks obtained at the viva voce test shall be added to the marks obtained in the written examination. The names of candidates will then be arranged by the Commission in order of merit. If two or more candidates obtain equal marks in the aggregate the order shall be determined in accordance with the marks secured at written examination. Should the marks secured at written examination of the candidates concerned be also equal, then the order shall be decided in accordance with the total number of marks obtained in the optional papers. From the list of candidates so arranged, the Commission shall nominate such number of candidates for each service as may be fixed by the Governor in order of their position in the list. The nomination so made shall be submitted to the Governor by such date in each year as the Governor may fix.

(emphasis added)

12. From a plain reading of the above provision it is clear that the merit list is to be prepared on the basis of the marks secured by the candidates at the written examination as well as the viva voce test. It is from that list, arranged on the basis of the aggregate mark that recommendations are made, in order of position of the candidates i.e. in order of merit. Thus though Sanjay Kumar and others were not eligible to be called for viva voce test the fact is that the marks secured by them in aggregate were sufficient or high enough to enable them to be recommended. Therefore, except that their appearing at the viva voce test was not in accordance with law, the final recommendation was not improper or arbitrary.

13. One way of looking at the situation is to quash the recommendation of Sanjay Kumar and others and direct the Commission to take fresh viva voce test for the 6 resultant vacancies, because there cannot be any justification to subject the remaining candidates to fresh viva voce test. They had obtained more marks than the Petitioners at the written examination and also qualified on the basis of aggregate marks. No serious argument was, in fact, made with respect to them. The question would arise as to how many candidates should be called for such viva voce test for only 6 vacancies. If only three times the number i.e. 18 candidates were to be called, it is not known if even Rameshwar Pati Tripathy, Pravin Kumar Singh Srinet or Amit Kumar Sinha would get the chance. The candidates may be some who were called earlier. As was pointed out on behalf of the Commission that marks of the written examination of the candidates having become known to all concerned, holding fresh viva voce test may not be very

safe.

14. The case of the Petitioners, in a sense, if I may say so, is based on hypothesis. Had Sanjay Kumar and others not been called for viva voce test, three of the Petitioners might have had chance to appear at the viva voce test. That indeed could be so. But the argument, attractive as it may be, is based on hypothesis and surmises. I do not think, in the facts and circumstances, it would be just and proper to interfere with the impugned recommendation merely because some of the Petitioners had a possible chance of selection, particularly when the recruitment process was completed pursuant to the order of the Supreme Court. As it transpired in course of hearing, the notification regarding appointment has also been issued on 18.8.2001. Two similarly situate OBC candidates, namely Ranjit Kumar and Ashok Kumar Gupta have already been appointed pursuant to the directions of this Court. It was submitted that their appointment was in the teeth of the interim order of the Supreme Court dated 13.5.94. There is substance in this submission but their appointment has not been challenged by any one. The fact remains that but for reservation they would not have had the chance to appear at the viva voce and get recommended for appointment. Except that Sanjay Kumar and Ors. could not have been allowed to appear at the viva voce test no other illegality has been pointed out. It is not a case of any favour shown to them. Nor they played any fraud or made misrepresentation. They were called for viva voce test bona fide and as per the terms of the advertisement. Though this Court had held that the reservation of OBCs was not permissible, the State had gone to the Supreme Court which entertained the SLP and passed an interim order permitting selection process to be completed.

15. In the facts and circumstances, I am of the view that equity lies in favour of the recommended candidates and the Court should not interfere. The recruitment process began in 1990. It has taken 11 years to complete the process. It is high time that curtain should be finally drawn on it.

16. I shall now take up the question of vacancies. The case of the Petitioners is that in 1991 the actual vacancies were 295 but only 245 vacancies were notified and the remaining 50 vacancies were left out for the Subordinate Judges which was not correct because post of Subordinate Judge is promotional post and there cannot be exchange of posts between basic post and promotional post. As a matter of fact, it is submitted, in the additional affidavit filed before the Supreme Court in SLP (Civil) No. 16476/93, on or about 11.8.95 i.e. after the viva voce test was over, the State Government gave details of the vacancy position in different posts in the State judiciary. 327 vacancies were shown in the post of Munsif. Only 123 appointments in the General category and 35 appointments in the SC/ST category having been made the vacancy works out to 87 as per the notified vacancies and if the additional 82 vacancies reported to the Supreme Court are added, it would come to 169 in all ($327 - 245 = 82 + 87 = 169$.) It was stated that in *Vijay Kant Jha v. State of Bihar* 1988 BBCJ 677, this Court had

directed the Respondents to fill vacancies occurring upto the last day of interview. In its judgment in Balmukund Sah's case also, the Supreme Court directed the "Government to fill all the vacancies in the post of Munsif. In these premises, the Court should direct the Commission and the Government to recommend/appoint candidates against all such vacancies. Reliance was also placed on Benny T.D. and Ors. v. Registrar of Cooperative Societies and Ors. (1987) 5 SCC 269 and Bhola Singh and etc. Vs. The Prescribed Authority, The Tehsildar and Others,

17. On behalf of the Respondents it was submitted that appointments cannot be made in excess of the notified vacancies. Besides, the next recruitment on the basis of the 25th Examination is in the final stage and the result of the 24th Examination cannot be stretched to include those vacancies for which fresh recruitment process is underway. Reliance was placed on Madan Lal and Others Vs. State of Jammu and Kashmir and Others, Prem Singh and Others Vs. Haryana State Electricity Board and Others, Sanjoy Bhattacharjee Vs. Union of India and others, and Achint Sinha v. State of Bihar 2001 (2) BLJ 522.

18. The legal position, I think, is well settled by decisions of the Apex Court. In State of Bihar and another Vs. Madan Mohan Singh and others, , selection process was initiated for appointment of 32 vacancies in the post of Additional District Judge. A merit list of 129 candidates was prepared. The Supreme Court held that after appointment of 32 candidates, the list got exhausted and the selection process came to an end. Madan Lal v. State of J & K (supra) was a case of appointment of Munsif in the State of J & K. The Court held therein that if requisition for recruitment is for 11 vacancies, the moment 11 vacancies are filled from the merit list, the list gets exhausted, or if during the span of one year from the date of publication of such list all the 11 vacancies are not filled in, the moment the year is over the list gets exhausted and in either event thereafter, further vacancies or vacancies remaining unfilled after one year can be filled by a fresh recruitment giving fresh opportunity to all the candidates in the market to compete. The Court, amongst other cases, relied on State of Bihar v. Madan Mohan Singh (supra). In Prem Singh v. Haryana State Electricity Board (supra) the Court held that if the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter only in exceptional circumstances or in an emergent situation, and that too by taking a policy decision in that behalf. In Benny T.D. v. Registrar of Cooperative Societies (supra), relied upon on behalf of the Petitioners, the Court observed that appointment in excess of vacancies notified does not necessarily lead to inference that the appointments were made in excess of the cadre strength because more vacancies could arise during the recruitment process on account of death or retirement. The observation would seem to support the Petitioners contention but understood in context, does not lend much assistance. The observation was made while considering the validity of the appointments already made. The observation

cannot be understood as giving licence to the State to make excess appointments in future. As a matter of fact, in Prem Singh's case (supra) also the appointments made against posts falling vacant after the commencement of the selection process or because of death were not disturbed.

19. The case of the Petitioners, as already stated above, is that vacancies were in existence at the time of commencement of the selection process in 1991. Rules 3 of the Recruitment Rules provide that the Governor shall decide in each year the number of vacancies in the post of Munsif to be filled by appointment on a substantive basis or temporary basis or both. In 1991 when the advertisement was published only 7 vacancies were notified though it was mentioned that the number could increase. The number of vacancies was notified in 1991 in the midst of selection process. This was not challenged. Everybody participated in the selection process for those 245 vacancies and took chance of success. At this stage, the unsuccessful candidates cannot be allowed to raise the issue.

20. It is not in dispute that pursuant to advertisement for the 25th Judicial Service Examination the recruitment process is almost over. Whatever be the vacancy position in 1991 when the advertisement was made or in 1991 when 245 vacancies were notified, the fact is that recommendations have already been made for all the 245 vacancies. Any direction to recommend more candidates would be for the additional vacancies at the cost of similarly situate candidates who having successfully competed for the next recruitment are waiting to be appointed. In the facts and circumstances, any such direction would not be either legal or proper. I am, therefore, not inclined to issue any direction for recommendation/appointment against additional vacancies on the basis of the 24th Judicial Service Examination.

21. In the result, these writ Petitioners are dismissed. No order as to costs.